IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JESSE F. DENHAM, Appellant	No. 33070-9-II UNPUBLISHED OPINION

Penoyar, J. – Jesse Denham appeals his juvenile adjudication of guilt for delivery of a controlled substance, raising a post-conviction challenge to the sufficiency of the charging document. Using the required more liberal standard of review, we conclude the charging document, while perhaps inartful, provided Denham adequate notice of the elements of the charge. We thus affirm his conviction.

FACTS

By a second amended information, the State charged Denham as follows:

> COUNT I: UNLAWFUL CONTROLLED SUBSTANCE PROHIBITED ACTS: TO MANUFACTURE, DELIVER OR POSSESS WITH INTENT TO DELIVER OR MANUFACTURE A CONTROLLED SUBSTANCE, A FELONY, 69.50.401(2)(b):
>
> JESSE F. DENHAM, in the County of Thurston, State of Washington, on or about the 19th day of January, 2005, did manufacture, deliver or posses [sic] with intent to deliver or manufacture a controlled substance, to wit: Adderall XR 5mg, a Schedule II controlled substance that contains amphetamine, to Ali Parrish.

Clerk's Papers (CP) at 6. Denham raised no objection to the sufficiency of this charging document prior to the trial court's finding of guilt. At the fact finding, the trial court orally found the State had proved Denham guilty beyond a reasonable doubt of possession with intent to deliver and also, on the same facts, delivery. The trial court's disposition order and written findings state that the trial court found Denham guilty of delivery of a controlled substance.

The parties did not agree as to which standard sentencing range applied. After resolving this dispute in the State's favor,[1] the trial court imposed a standard sentencing range disposition. Denham now appeals his conviction, challenging only the sufficiency of the charging document.

ANALYSIS

Noting that the trial court convicted him of delivery and that the charging document does not specifically allege that he knew the Adderall was a controlled substance, Denham argues for the first time on appeal that the charging document failed to give him notice of the guilty knowledge element of delivery of a controlled substance. While we ordinarily do not address issues raised for the first time on appeal, RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995), "[a] challenge to the constitutional sufficiency of a charging document may be raised initially on appeal." *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

Both the federal and state constitutions require a charging document to include all essential elements of the charged crime, including any non-statutory elements. Wash. Const. art. I, § 22; U.S. Const. amend. VI; *Kjorsvik*, 117 Wn.2d at 97, 101-02. However, when the sufficiency of the information is challenged for the first time on appeal, we must liberally construe

[1] Denham does not challenge this decision on appeal.

it in favor of validity, following a two pronged test:

> (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Kjorsvik, 117 Wn.2d at 105-106.

The first prong of this test requires "at least some language in the information giving notice of the allegedly missing element(s)." *Kjorsvik*, 117 Wn.2d at 106. However, the charging document need not use the exact words of an element; it is enough if "the words used would reasonably apprise an accused of the elements of the crime charged." *Kjorsvik*, 117 Wn.2d at 109. We must read the charging document as a whole, give words their common sense meanings, and incorporate all necessarily implied facts. *Kjorsvik*, 117 Wn.2d at 109.

Although not included in the statutory definition, RCW 69.50.401, proof of delivery of a controlled substance requires proof that the defendant knew the substance to be a controlled substance, and the charging document must include this essential element. *State v. Johnson*, 119 Wn.2d 143, 146-47, 829 P.2d 1078 (1992). However, this court-imposed guilty knowledge element is not an element of possession with intent to deliver a controlled substance. *State v. Valdobinos*, 122 Wn.2d 270, 284, 858 P.2d 199 (1993); *State v. Sims*, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992). This is because the statutory element of intent to deliver the controlled substance is the required mental element, necessarily including knowledge of the substance. *Valdobinos*, 122 Wn.2d at 284; *Sims*, 119 Wn.2d at 142.

Denham relies on *State v. Kitchen*, 61Wn. App. 915, 917-18, 812 P.2d 888, *review denied*, 117 Wn.2d 1019 (1991). In that case, the defendants, charged solely with delivery by

informations that simply alleged "you delivered a controlled substance . . . to an undercover agent," raised a post-conviction challenge to the failure of the charging documents to include the element of guilty knowledge. 61 Wn. App. at 916-17. Even using *Kjorsvik*'s liberal review for post-verdict challenges, the *Kitchen* court reversed because of the utter lack of any language, express or implied, regarding an alleged mental state in the charging documents.

However, the later Washington State Supreme Court case, *Valdobinos*, distinguishes *Kitchen* and controls the result in Denham's case. *Valdobinos*, 122 Wn.2d at 285-86, 286 n.4. The State charged the *Valdobinos* defendant with three counts: (1) delivery of cocaine, (2) possession of cocaine with intent to deliver, and (3) conspiracy to deliver cocaine. *Valdobinos*, 122 Wn.2d at 284-85. The charging language for the delivery count did not include the guilty knowledge element.[2] *Valdobinos*, 122 Wn.2d at 285. But the court concluded as follows:

> The information charged [defendant] not only with delivery of a controlled substance, but also with conspiracy to deliver a controlled substance and intent to deliver a controlled substance, and alleged facts to that effect. It is inconceivable that [defendant] would not have been on notice that he was accused of knowing the substance in question was cocaine. Therefore, reading the information as a whole and in a commonsense manner, the failure to include "guilty knowledge" in count 1 does not render the information constitutionally inadequate.

Valdobinos, 122 Wn.2d at 286.

In Denham's case, the information charged him in the alternative with both possession with intent to deliver and with delivery. The words used to do so were perhaps inartful or vague, but that is the only logical reading of "DENHAM . . . did . . . deliver or posses [sic] with intent to deliver . . . a controlled substance." CP at 6. The alternative charge of possession with intent to

[2] Count 1 used the following relevant language: "Defendant did feloniously deliver . . . Cocaine . . . to an undercover agent." *Valdobinos*, 122 Wn.2d at 285 (second ellipsis in original).

deliver properly included the mental element of intent to deliver the controlled substance in question, "Adderall XR 5mg, a Schedule II controlled substance that contains amphetamine."

CP at 6. Given that the charging document accused Denham of intending to deliver this controlled substance, "[I]t is inconceivable that [Denham] would not have been on notice that he was accused of knowing the substance in question was" amphetamine. *See Valdobinos*, 122 Wn.2d at 286. Just as in *Valdobinos*, when we liberally construe the language of the charging document, it provided notice to Denham of the guilty knowledge element.[3]

Although we have concluded, under *Kjorsvik*'s first prong, that the element of guilty knowledge appears "in any form" or "by fair construction can . . . be found" in the information, Denham could still attempt to establish that the information's "inartful language" caused prejudice by preventing actual notice. *Kjorsvik*, 117 Wn.2d at 105-106. But Denham claims no prejudice, and we affirm his adjudication of guilt.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Quinn-Brintnall, C.J.

Armstrong, J.

[3] This decision does not control the possible result had Denham raised a challenge to the charging document prior to the finding of guilt.